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Thursday, May 3, 2001

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

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In re





JON STERNGOLD,

No. 99-13159

[Debtor](#)  (s).

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Memorandum of Decision

Debtor Jon Sterngold, a physician, filed a [Chapter 7](#)  petition on October 15, 1999, and received a [discharge](#)  on February 15, 2000. His case was thereafter closed as a "no-asset" case with no claims bar date and no dividend to creditors. On September 25, 1999, just before the bankruptcy, Sterngold had performed a dermal hair removal procedure on Donna Stafford. Stafford was not scheduled as a [creditor](#) . On September 19, 2000, Stafford filed suit against Sterngold in state court, alleging that the procedure was done so recklessly as to amount to willful and malicious conduct and that permanent disfigurement resulted. She also alleges that he was covered by liability insurance at the time. Sterngold has asked the court to reopen the case so that he can amend his [schedules](#)  to add Stafford as a creditor. He mistakenly believes that this would result in a bar to further prosecution of the state court

action. Since he is mistaken, the court takes the time to explain the proper procedure to resolve this situation. If Sterngold was in fact covered by insurance at the time he performed the procedure on Stafford, then she may proceed with the state court suit regardless of whether or not she is scheduled as a creditor. As long as recovery is limited to insurance, a bankruptcy discharge does not prohibit litigation on a discharged debt. In re Beeney, 142 B.R. 360, 362 (9th Cir. BAP 1992). If Sterngold was not covered by insurance, or if Stafford wishes to collect from Sterngold personally, then the issue becomes whether or not her [claim](#)⁽¹⁾ has been discharged. Contrary to Sterngold's belief, amending the schedules would not automatically bar Stafford's state court suit because dischargeability is an open issue, and the permanent injunction of § 524(a) of the [Bankruptcy Code](#)⁽²⁾ only applies to discharged debts. To determine if Stafford's claim is subject to the discharge, Sterngold would have to either plead his bankruptcy discharge as an affirmative defense in state court⁽¹⁾ or file a complaint to determine dischargeability in this court.⁽²⁾ Amendment of the schedules to add Stafford would be a meaningless act at this point, regardless of whether Sterngold decided to litigate dischargeability in state court or bankruptcy court. Dischargeability is governed in both forums by § 523(a)(3)(B) of the Bankruptcy Code, which provides that a claim based on willful and malicious conduct is not discharged if not scheduled in time for the creditor to timely file a [proof of claim](#)⁽³⁾ and request a determination of dischargeability "unless the creditor had notice or actual knowledge of the case in time for such timely filing and request." Since there was never a bar date for claims, that is not an issue now. However, the last day to request a determination of dischargeability under § 523(a)(6) was February 14, 2000. Amending the schedules will not change the fact that Stafford missed this deadline. If she missed it because she was not scheduled as a creditor and had no actual knowledge of the case in time to file a timely request, then her claim may be nondischargeable pursuant to § 523(a)(3)(B).⁽³⁾ The court remains mystified as to Sterngold's reading of In re Beezley, 994 F.2d 1433 (9th Cir. 1993). The holding of that case is that a motion to reopen must be denied when it would not result in any relief. In affirming the bankruptcy court's refusal to allow a debtor to reopen his case, the Court of Appeals there specifically noted: "After [a Chapter 7 case] has been closed, dischargeability is unaffected by scheduling; amendment of [the debtor's] schedules would thus have been a pointless exercise." 944 F.2d at 1434.⁽⁴⁾ The court notes that Stafford does not appear to have a strong case under § 523(a)(6). In Kawaauhau v. Geiger, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998), the Supreme Court held that it is insufficient under § 523(a)(6) to show that the debtor acted willfully and that the injury was negligently or recklessly inflicted; instead, it must be shown not only that the debtor acted willfully, but also that the debtor inflicted the injury willfully and maliciously rather than recklessly or negligently. However, that issue is for the state court to decide or for this court to decide in the context of an [adversary proceeding](#)⁽⁵⁾; adjudication at this time is not proper. To summarize and give guidance to the parties, the court will order as follows: 1. Sterngold's motion to reopen the case in order to file an amended schedule is denied. 2. Stafford's state court action may proceed unless subsequently enjoined by this court. If Sterngold raises his bankruptcy discharge as a defense, the state court should determine if Stafford had notice or actual knowledge of the bankruptcy in time to file a dischargeability action by February 14, 2000 and, if she did not, whether she would have prevailed, in light of Kawaauhau v. Geiger, if she had filed a timely action. 3. After 120 days from the date of this memorandum, and upon a showing that he has provided Stafford with complete, detailed and accurate information concerning all liability insurance he had or has which might be a source of recovery for her damages, Sterngold may again seek to reopen his bankruptcy solely for the purpose of filing

a dischargeability action pursuant to § 523(a)(3) of the Bankruptcy Code. If Sterngold establishes that there is absolutely no insurance covering his alleged liability to Stafford, then Sterngold may seek and the court will consider enjoining the state court action while the issue of dischargeability is litigated here. An appropriate order will be entered.

Dated: May 3, 2001

Alan Jaroslovsky

U.S. [Bankruptcy Judge](#) 

1. Since Stafford was not scheduled as a creditor, dischargeability of her claim is governed by § 523(a)(3) of the Bankruptcy Code. "Jurisdiction over [§ 523(a)(3) issues] is held concurrently by the bankruptcy court and any appropriate nonbankruptcy forum." Advisory Committee note to FRBP 4007.

2. FRBP 4007(a) provides that a debtor or a creditor may file a complaint to obtain a determination of the dischargeability of any debt.

3. Of course, it is not sufficient for Stafford to merely allege that her claim was nondischargeable under § 523(a)(3)(B); she also has to prove that she would have prevailed on a § 523(a)(6) action if she had known about the bankruptcy in time to file one. In re Lochrie (9th Cir.BAP 1987) 78 B.R. 257.

4. Nor does anything in Beezley undo FRBP 4007(a), as Sterngold also a

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